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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92055585
Party	Defendant Drew Massey dba myUndies Inc.
Correspondence Address	DREW MASSEY DBA MYUNDIES INC 3387 XANTHIA STREET DENVER, CO 80238 UNITED STATES massey@masseyventures.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Drew Massey
Filer's e-mail	massey@masseyventures.com
Signature	/Drew Massey/
Date	07/18/2012
Attachments	myUNDIES Trademark Request for Cancellation Dismissal Response 2 to P.pdf (11 pages)(607218 bytes)

REGISTRANT'S REPLY BRIEF TO PLAINTIFF'S BRIEF

THE REGISTRANT REQUESTS AGAIN THAT AN IMMEDIATE DISMISSAL OF THE PETITIONER'S CANCELLATION PROCEEDINGS POST HASTE.

PETITIONER HAS MADE ADDITIONAL FALSE STATEMENTS ASKING TO STRIKE PREVIOUSLY PROVEN STATEMENTS. PETITIONER IS ATTEMPTING TO CREATE CONFUSION AND IS AVOIDING THE SIMPLE FACT THAT REGISTRANT'S MARK IS IN COMMERCE AND AVAILABLE FOR PURCHASE.

PETITIONER IS CAUSING HARM TO LEGALLY OWNED REGISTRANT BY THE CONTINUED USE OF SIMILAR MARK AND IS NOW CAUSING FURTHER HARM TO REGISTRANT BY MAKING FALSE ALLEGATIONS, FABRICATED TESTIMONY AND CAUSING DURESS ON REGISTRANT BY FILING A FRAUDULENT CANCELLATION PETITION.

THE USPTO BOARD SHOULD NOT ALLOW THE CONTINUED UNETHICAL LEGAL ACTIVITY BY THE PETITIONER'S COUNSEL AND SHOULD REJECT AND DISMISS THE CANCELLATION AGREEMENT IMMEDIATELY AND NOT SUBJECT THE REGISTRANT TO 15-18 MONTHS OF EXTRAORDINARY LEGAL PROCEEDINGS AND COSTS. PLEASE SEE BELOW.

SPECIFIC DENIALS TO THE PETITIONER'S ADDITIONAL CLAIMS:

Petitioner's new claims:

1. Petitioner claims that retail store not valid.
2. Petitioner claims that only one sample has been produced.
3. Petitioner claims company is dependent on .com URL.
4. Petitioner claims Registrant is attempting to Extort Settlement.

REGISTRANT RESPONSE

1. DENY. The Plaintiff does not deny that the registration of the Registrant's mark is less than 3 years old. Registrant has focused on finding the best solutions for building its company. Registrant has made a business decision to sell product via the world's largest social and commercial online enterprise—www.facebook.com. Similar to public company Zynga (\$4-5 billion market capitalization) that sells a majority of each of its products via www.facebook.com, Registrant leverages the world's biggest website facebook.com to sell its goods. The commerce site can be found at www.facebook.com/MYUNDIES. Registrant's products are also listed in the largest "shopping mall" on Facebook by payvment who powers thousands of brands and merchants.

2. DENY. Petitioner "hangs it hat" on the fact that Registrant only has a "single" sample and continues to use that as a claim of non-use. However, as previously attested, Registrant has thousands of produced product with trademark. Pictures are attached below. Though, again, the best proof is to merely purchase the merchandise (see #1 above). The Petitioner is again making false assumptions.

3. DENY. Registrant's company is based on the brand name MYUNDIES and not based on any URL. The Registrant company name and all identifying marks in Registrant's LIVE mark are based on the brand MYUNDIES and do not reference a URL in the name, image, company name, etc. And all company produced product and labels exclusively use the singular brand MYUNDIES. URLs have and will only be used for marketing efforts. Furthermore, Plaintiff is attempting to cause confusion by referencing an invalid dead mark that is not relevant to the live Registrant's mark. Also, contrary to Petitioner's continued false claims, Registrant has never produced a hangtag with the URL www.myundies.com. On the contrary, and as proven by photo evidence in the prior filing, the Registrant has produced a promotional hangtag based on the URL www.freemyundies.com.

Additionally, Registrant owns many URLs with the MYUNDIES trademark including MYUNDIES.ORG, MYUNDIES.INFO, GETMYUNDIES.COM, FREEMYUNDIES.COM, SHOPMYUNDIES.COM, etc. Further proving that the Registrant's legal live mark has always been about MYUNDIES and not a URL. And while strategic reasons are confidential, Registrant's marketing efforts include plans for leveraging several URLs (not unlike companies like bit.ly and de.licio.us). For example, Registrant's core consumer is aligned with social and charitable causes so the .org domain is important to the Registrant (ie., like craigslist.org). The company has no legal requirement, nor intention to own every available domain extension. **To that point, the Petitioner HAS NOT DENIED that it does not own every URL iteration of the infringing mark MEUNDIES. Currently, MEUNDIES.ORG and MEUNDIES.INFO as well as at least 50 more extensions are available for purchase.** Similarly, hundreds of top brands do not own all of the different iterations of URLs available for their brands.

Furthermore, contrary to CONTINUED Petitioner's false claims, Marchex who owns the .com extension of MYUNDIES does not have a competing underwear company. Marchex is the world's largest and most well known "cyber-squatter" who sits on millions of website names related to different brands attempting to extort brands to purchase URLs from them (or litigate via ICANN to secure the URLs).

4. DENY. Petitioner is again blatantly fabricating false statements. The demand email referenced and shown in the Petitioner's filing specifically requests that Petitioner: 1) cease trademark cancellation claim; 2) STOP using infringing mark and; 3) pay \$25,000 in legal costs as directly billed by counsel. For Petitioner's counsel to just highlight the \$25,000 payment for actual billed legal settlement expenses (which is explicitly noted as billed expenses from expected legal counsel), and to call it extortion, is an obvious attempt to directly mislead the USPTO. And is again proof that Petitioner's counsel will make any and all attempts (whether ethical or illegal) to mislead and

obstruct the truth. The demand email is clear and concise—stop using the infringing mark and cease this fraudulent cancellation request. And, upon settlement, pay whatever legal fees Registrant incurs to finalize that agreement—as directly billed by legal counsel. The Registrant does not receive any compensation and the email does not ever reference any requests for monetary compensation. So, again, for Petitioner's counsel to purposely confuse the truth and try to claim extortion is a lie. To that point, had Petitioner really believed this was extortion, Petitioner would have included it in Petitioner's May 31, 2012 filing. Petitioner is clearly "throwing everything against the wall to see what sticks".

ADDITIONAL NON-REPLIES FROM PETITIONER

1. PETITIONER FAILED TO PROVE THAT HE DID PROPER DILIGENCE BEFORE FILING IDENTICAL INFRINGING MARK. Petitioner's legal counsel claims under signed decree that he did a thorough investigation prior to Petitioner's use of infringing trademark. Again, the Petitioner's counsel is providing false testimony and should be held liable and accountable. He clearly failed to do the basic necessary research prior to his client using the infringing mark and they are now attempting to recreate a paper trail to attempt to prove diligence. Had counsel merely typed in the word "undies" in the USPTO.gov TESS search engine, he would have found fewer than 100 trademarks and would have found the live MYUNDIES mark. At that time counsel would have seen that the Registrant's mark was a LIVE trademark and should have advised his client to find another mark. Any qualified intellectual property attorney would do that basic trademark search and make that determination and advise his/her client accordingly versus attempting to duplicate a live trademark. **Either the Petitioner's counsel failed to do the most basic necessary diligence required of an intellectual property attorney (ie., type in a few variations of a client's desired trademark name into the trademark search engine and review the results) and falsely claimed**

otherwise under signed testimony, or Petitioner's counsel unwisely and illegally advised client to purposely infringe on a LIVE registered trademark with just a single letter difference for an identical service. Either way, the USPTO correctly denied the Petitioner's trademark

application. And now Petitioner's counsel is attempting to "save face" (and generate unneeded billable hours) by attempting to cancel Registrant's legal mark. Again, unduly burdening a legally owned and LIVE trademark Registrant.

2. PETITIONER FAILED TO PROVE THAT PETITIONER DID NOT HAVE EMPLOYEE CALL UNDER FALSE PRETENSES. Upon correctly being denied registration of infringing mark by the USPTO, Petitioner's counsel had one of its employees (Noah Taubman) call the Registrant and fraudulently pretend to be a college student in order to attempt to gather more information. The fact that Petitioner is now disclosing that Petitioner had Noah Taubman call is further proof of fraud as Noah Taubman claimed to NOT BE WORKING FOR PLAINTIFF. NOAH TAUBMAN CLAIMED HE HAD JUST GRADUATED FROM "AN APPLE PROGRAM" AND WANTED TO START BLOGGING FOR WEBSITES. FURTHERMORE, REGISTRANT NEVER TOLD NOAH TAUBMAN THAT THE TRADEMARK WAS NOT IN USE. THIS IS A BLATANT LIE. AND PETITIONER'S COUNSEL WOULD HAVE A SWORN AFFIDAVIT FROM NOAH TAUBMAN HAD THIS BEEN TRUE. AGAIN, PETITIONER AND PETITIONER'S COUNSEL ARE FABRICATING TESTIMONY AND OBSTRUCTING THE TRUTH. Again, for Petitioner's counsel to fail to acknowledge this information in his previously signed testimony is further proof of bad faith and fraud by Petitioner and Petitioner's counsel. Besides the fact that having the Petitioner's employee contact Registrant under false pretenses is possible grounds for counsel's disbarment (breach of ethics), it proves that Registrant could be contacted and that Petitioner's counsel could and should have easily done the same had he done a basic trademark search prior to attempting to register an infringing trademark. **The fact that counsel never contacted Registrant except under false pretenses AFTER Petitioner's trademark application was denied, FURTHER proves lack of diligence.**

3. PETITIONER FAILED TO ADDRESS THE FACT THAT THE PETITIONER'S TRADEMARK APPLICATION CLAIMS MORE PRODUCTS THAN SOLD BY PETITIONER. The Petitioner questioned specific trademarked goods currently being manufactured and sold by Registrant, but at the same time the Petitioner's denied trademark application includes selling "undergarments", "clothing", "apparel", and "lifestyle accessories" yet the Petitioner does not produce or sell any products besides just 3 types of underwear bottoms for men and women (and not even not bras/tops for women). Almost all of the claimed items in Petitioner's trademark application are NOT used in commerce.

4. PETITIONER FAILED TO ADDRESS THAT PETITIONER DOES NOT OWN EVERY URL OF ITS INFRINGING NAME. Petitioner does not own every URL iteration of the infringing mark MEUNDIES. Currently MEUNDIES.ORG and MEUNDIES.INFO as well as at least 50 more extensions are available for purchase.

5. PETITIONER ABANDONED FIRST ATTEMPT AT TRADEMARK. The Petitioner's previous Me Undies application 85265241 was abandoned by Petitioner. The Petitioner's company name is MEUNDIES yet they attempted to trademark the name in two words. Showing that rather than create an independent company name, Petitioner is making multiple attempts to capitalize on the Registrant's brand and duplicating the name.

In summary, the basic fact is that the Registrant owns a LIVE trademark for goods that are produced and sold. The mark was approved on September 29, 2012. Less than 3 years ago. And the Registrant is investing and building its business legally in good faith with an original name and brand that is now being infringed upon by the well-financed Petitioner. The

Petitioner can continue to “throw everything against the wall to see what sticks”, but cancellation of a LIVE mark carries serious legal, financial and business implications and should only be considered in the case of fraud which is clearly not the case with Registrant.

The USPTO denied the Petitioner's attempted infringing trademark application based on unmistakable likelihood of confusion (again, just ONE letter difference in the name while selling identical goods). Please do not now allow the Petitioner to abuse the trademark process by fraudulently attempting to cancel Registrant's legal trademark. Please do not allow the Petitioner to unduly burden Registrant with 15-18 months of legal expenses. **As the USPTO attorney who denied the Petitioner's attempted infringing trademark succinctly said best:**

“It appears that you are being bullied by a party whose TM rights are junior to yours.

I sincerely hope you prevail.”

BASED ON THESE FACTS, AND THE FACTS PREVIOUSLY SUBMITTED, THE REGISTRANT AGAIN REQUESTS IMMEDIATE DISMISSAL OF THE PETITIONER'S CANCELLATION PROCEEDINGS POST HASTE. PLEASE DO NOT LET BASELESS CLAIMS WASTE THE RESOURCES OF THE USPTO AND LAW ABIDING LEGAL TRADEMARK OWNERS.

THANK YOU IN ADVANCE FOR YOUR CONSIDERATION AND ACTION TO IMMEDIATELY DISMISS THE CANCELLATION REQUEST.

EXHIBIT

myUNDIES Additional Product Inventory Photos







CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this paper has been served upon petitioners legal counsel via USPS at address below provided on this date.

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Date: 7/18/12